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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1250

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, ETC., ET AL.,
Petitioners,

VERSUS

ROBERT L. DOWELL, an infant who sues by A. L. DOWELL, his father and next friend,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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603 First National Center
Oklahoma City, Oklahoma 73102

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April, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. -----

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, ETC., ET AL.,
Petitioners,

VERSUS

ROBERT L. DOWELL, an infant who sues by A. L. DOWELL, his father and next friend,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Board of Education of the Oklahoma City Public Schools, Independent District No. 89 of Oklahoma County, Oklahoma, a public body corporate,[1] and school district officials, Petitioners, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on January 28, 1975, in Case No. 74-1415, wherein these Petitioners were Defendants-Appellants and the Respondent herein

[1] The statutory name of the School District is Independent School District Number 89 of Oklahoma County, Oklahoma. 70 O.S. 1971, § 5-105. Its boundaries are not the same as those of the City of Oklahoma City, a separate and distinct municipal corporation, but it is commonly known as and will be referred to herein as the Oklahoma City School District. The Petitioners are the Board of Education and its members, and the Superintendent of Schools, of the School District.

was Plaintiff-Appellee, which judgment affirmed an order entered June 3, 1974, by the United States District Court for the Western District of Oklahoma.

OPINIONS BELOW

There was no formal opinion of the District Court. The order of the District Court, affirmed by the judgment of the Court of Appeals, is reproduced in Appendix A to this Petition.

The aforesaid judgment of the United States Court of Appeals for the Tenth Circuit was in the form of an order. No opinion was delivered. The order is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on January 28, 1975. A timely petition for rehearing was denied on February 26, 1975. There was no order granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Jurisdiction of the United States District Court for the Western District of Oklahoma to order the removal, solely because of color, of a black Principal of a high school that has an integrated staff and faculty.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of Section 1 of the Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves the integration of the Oklahoma City Public School System. It is being operated under a school integration plan approved by the trial court on February 1, 1972. The Oklahoma City Board of Education has complied with a previous order of the trial court to integrate the staffs and faculties of all schools in the System, so that the percentage of non-white school personnel in each school will be approximately the same percentage of non-white school personnel in the entire System. A majority of the students at each high school are white students.

During the 1973-74 school year, Northeast and Douglass High Schools had black Principals. On May 1, 1974, the trial court directed the Board of Education to consider, among other things, replacement of these black Principals with white Principals for the 1974-75 school year. The Board of Education responded that it believed the black Principals should remain where they were, but that one white Assistant Principal and one black Assistant Principal would be assigned to Northeast, and two white Assistant

Principals and one black Assistant Principal would be assigned to Douglass.

On June 3, 1974, the trial court issued its order accepting several proposals of the Board of Education, made at the suggestion of the trial court, but directing removal of the two black Principals and their replacement with white Principals, because the trial court thought black Principals would identify the two high schools as "black schools."

The trial court did not hold any evidentiary hearing before issuing its order, or give the Board of Education any opportunity to be heard or to present evidence in support of its refusal to remove the black Principals; nor did the Plaintiff in the case apply for the removal of the black Principals.

The Board of Education appealed to the United States Court of Appeals for the Tenth Circuit from the part of the order removing the Principals; and on January 28, 1975, the trial court's order of June 3, 1974, was affirmed by a panel of three judges of the Court of Appeals, two judges being for affirming the order, and one judge dissenting. A petition for rehearing was timely filed; and it was denied on February 26, 1975, one of the three judges voting to grant the petition.

The basis for federal jurisdiction in the court of first instance was 42 U.S.C. § 1983. The stated objective of the Plaintiff was to secure rights guaranteed by the due process and equal protection clauses of Section 1 of the 14th Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

A School Is Not Racially Identifiable by the Color of Its Principal.

The trial court's decision, affirmed by the Court of Appeals, that the black color of the school's Principal identifies the school as a "black school" goes beyond what this Court said are the indicia of a racially identifiable school in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).[2]

If the trial court was correct in its view that the Principal's color identifies his school, then every school in the United States is racially identifiable. It is either a "white school" or a "non-white school," depending on the color of the Principal, according to the trial court (and the Court of Appeals). This is not supported by logic or decisions of other courts.

The Board of Education has already fulfilled its responsibility to integrate school personnel. All schools have the proper ratios of black and white personnel.[3]

---

[2] This Court said in *Swann* (402 U.S. at 18, 91 S.Ct. at 1277):

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

[3] In *United States* v. *Sch. Dist. 151 of Cook County, Ill.*, 301 F.Supp. 201, 229 (1969), modified on other grounds in 432 F.2d 1147, *cert den.* in 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111, it was held:

> "The defendants' present obligation, in order to overcome the effects of prior discrimination, is to allocate faculty and professional staff members so that no school is identifiable, by the racial composition of its faculty, as being tailored for a heavy concentration of Negro or white students, * * * That objective will be achieved when

The trial court found no fault with the black and white ratios of school personnel at the two high schools. Neither school was identifiable by the composition of its personnel as being tailored for a heavy concentration of black or white students. The requirements of *Swann*, in this regard, have been met.[4]

Assignments of School Personnel Are Not Within the Jurisdiction of District Courts.

This Court said in *Swann* that there are limits as to how far District Courts can go in dismantling a dual school system. A court goes too far when it gets into school administration.[5]

The trial court did just that, when it removed the two black Principals. This was contrary to court decisions that

---

[3] (Continued)
the racial composition of the faculty and staff of each school is approximately proportional to the racial composition of the system's entire faculty and staff at the same level or grades."

[4] In *George* v. *Davis*, 365 F.Supp. 446, 448 (1973), it was stated that:

"after an acceptable faculty ratio has been deliberately arrived at, the future hiring, firing, promoting or demoting of teachers or staff members must be on a purely non-discriminatory basis, with race playing no part whatsoever in the process."

[5] It was stated in *Milliken* v. *Bradley*, 94 S.Ct. 3112, 3125 (1974):

"No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U. S. 451, 469, 92 S. Ct. 2196, 2206, 33 L. Ed. 2d 51. Thus, in San Antonio Independent School District v. Rodriquez, 411 U. S. 1, 50, 93 S. Ct. 1278, 1305, 36 L. Ed. 2d 16, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation and a healthy competition for educational excellence."

the judiciary is not designed or equipped to operate and manage school systems, and should not substitute its own judgment for a school board's judgment. *New Rider* v. *Board of Education of Independent School District No. 1, Pawnee County*, Okla., 480 F.2d 693 (10th Cir. 1973), *cert. den.* 414 U.S. 1097, 94 S.Ct. 733, 38 L.Ed.2d 556; *Pride* v. *Community School Board of Brooklyn*, 488 F.2d 321 (2nd Cir. 1973); *Morales* v. *Shannon*, 366 F.Supp. 813 (1973); *Amburgey* v. *Cassady*, 370 F.Supp. 571 (1974).

Issuance of an Order Nullifying an Administrative Decision of a School Board, Without a Hearing, Is an Abuse of Judicial Power and Violates Due Process Requirements.

The trial court directed the Board of Education to consider changes in assignments of high school Principals. The trial court was informed by the Board of Education that the changes were believed to be inadvisable. There was no hearing to receive evidence in support of the changes. The Board of Education was not afforded an opportunity to submit evidence against the changes.

The trial court decided itself, without a hearing and without any evidence, that the two black Principals should be removed from their assignments, and issued its order accordingly.

This arbitrary action of the trial court violated due process requirements for a hearing at which the Board of Education would have an opportunity to explain its procedures regarding employment of school personnel, and to establish that assignments of personnel were not racially motivated. *Bradley* v. *School Board of the City of Richmond*, Va., 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; *United*

States v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir. 1969), *cert. den.* in 395 U.S. 907, 89 S.Ct. 1749, 23 L.Ed.2d 220; *Calhoun* v. *Cook*, 487 F.2d 680 (5th Cir. 1973); *Lee* v. *Macon County Board of Education*, 453 F.2d 1104 (5th Cir. 1971); *Brown* v. *Board of Education of City of Bessemer*, 446 F.2d 75 (5th Cir. 1971).

Issues Presented Are of Public Importance Warranting Decision by This Court.

It is of widespread public importance that this Court consider the issues here presented so that the lower courts and the public may be guided authoritatively with respect to the limitations on the powers of District Courts in school administration.

CONCLUSION

The decisions and orders below, if allowed to stand, will, in effect, undermine numerous decisions of this Court; and a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

April, 1975

APPENDIX A

FILED
JUN 3 1974
REX B. HAWKS
Clerk, U.S. District Court
By S. J. BAILEY,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, ETC., ET AL.,	)	
	)	
Plaintiffs,	)	
v.	)	NO. 9452 Civil
	)	
BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, ETC., ET AL.,	)	
	)	
Defendants.	)	

ORDER

Pursuant to the Court's Order of May 2, 1974, the defendant Board of Education of the Oklahoma City Public Schools has submitted three reports. The Biracial Committee has responded to the recommendations contained in the third and final report. The Court is encouraged by the dialogue that has taken place between the members of the Board and the Biracial Committee and appreciates the time and effort that members of the Committee and the Board have contributed to seeking new means of converting the Oklahoma City Public Schools from a dual system into a unitary system. The Court also notes with regret the failure of the Board to approve the recommendation of its subcommittee on student assignments for a long range plan which inevitably would have hastened the accomplishment of the unitary system and the day when this Court could,

under the decisions of the Supreme Court, relinquish its jurisdiction over this case by declaring that the constitutional requirements have been achieved. Such an expression of good faith could have signaled a dramatic end to the era of recalcitrance which has so long been a concern of the Court in its continuing duty to assure constitutional compliance.

In reviewing the reports the Court specifically finds respectively as to each recommendation of the Board:

A-1. The Court approves the closing of Henry and Page Schools and the conversion of North Highland from a K-5 Elementary School to a K, 5 Year Center.

A-2. The Court neither approves nor disapproves the recommendation concerning the transfer of Arcadia students for the reason that the Court does not have either sufficient factual or legal data to make an informed and appropriate disposition of the recommendation.

A-3. The request concerning the Star Spencer area was embraced in the plan of Dr. Finger and its continued treatment in this manner is approved.

A-4. The Court neither approves nor disapproves the recommendation concerning the de-annexation of a portion of the Star Spencer area (the Dunjee annexed area) for the reason that the Court does not have either sufficient factual or legal data to make an informed and appropriate disposition of the request.

B-1. The Court does not disapprove the proposal of the Board concerning assignments of vice-principals at Douglass, Grant, Marshall and Northeast, but does not accept it in lieu of the recommendation of the Biracial Committee that the principals at Northeast and Douglass be white. These are the two high schools in the system which have been and are now clearly racially identifiable in the community. So long as the two high schools with the largest black enrollment are the only high schools in the system

with blacks as the top administrators it will be difficult, if not impossible, to erase the racial characteristics of the schools' identity in the community. The Board seeks to justify its refusal to accept the recommendation of the Committee by suggesting that black principals are necessary to maintain stability in these schools. This appears to be another way of saying that it does not want these schools to change, an impermissible objective. The negative implication of the suggestion is that black principals are only competent to serve in black schools and that black students in such schools are incapable of being governed by a non-black principal. Such subtle discrimination does a disservice to both the black administrators and students. The Court believes that blacks can serve effectively as administrators in any school and that black students, the same as white students, will respond to a capable, conscientious, and sensitive principal regardless of color. The claim of the Board unsupported by any factual substantiation is highly speculative at best, and is not shared by the Biracial Committee. The Committee is composed equally of blacks and whites. Not only does it not foresee the harmful consequences predicted by the Board but it "feels the desegregation plan would be advanced significantly if, as a minimum, the principals of Northeast and Douglass were white." The viewpoint of the Committee can't be classed as black or white but as the consensus of human beings seriously and conscientiously seeking in a courageous and creative sort of way to propose measures appropriate and necessary to consummate a unitary system in the Oklahoma City Public Schools and the termination of Court jurisdiction. The Court values greatly the Biracial Committee's impartial judgment in these matters.

In the normal situation the assignment of school principals is a matter of administration and of no concern to the Court but in the factual context here presented the Board manifests a policy calculated to maintain the present status of these schools and to discriminate against black admin-

istrators. The Court finds it difficult to accept that it is by coincidence, and not by design, that the only two "black" high schools have the only two black principals. This conclusion is reinforced by the pattern of discriminatory treatment of black administrators disclosed by the report of the Biracial Committee to the Court dated November 1, 1973, in which it was pointed out:

> "In the K-4 schools, which are located chiefly in the west side of the district, the percentage of black principals is very low, being only two out of a total of 55, while in the 5th grade centers, located in the east, this percentage is extremely high. There are no black principals or assistant principals in any of the 10 K-5 schools. The middle schools also show a very low ratio of black principals. It appears that this is the area in which some readjustment is indicated, as far as faculty assignment is concerned."

On September 7, 1965, this Court entered its Order directing faculty desegregation. The Court of Appeals in 1967 approved the Order noting:

> "The existing situation reflects racial discrimination in the assignment of teachers and other personnel. The order to desegregate faculty is certainly a necessary initial step in the effort to cure the evil of racial segregation in the school system." The Board of Education of the Oklahoma City Public Schools v. Dowell, 375 F.2d 158, 167 (CA10 1967), cert. denied 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 993.

The Court finds that the presently existing situation reflects racial discrimination in the assignment of black administrators within the system. The Oklahoma City schools cannot be a unitary system so long as there remain racially identifiable schools and discriminatory personnel policies. The measure proposed by the Committee appears to be a reasonable means to expedite the elimination of both such impediments. Accordingly, the Court approves the recom-

mendation of the Biracial Committee and directs new assignments of principals to be made resulting in white principals at Northeast and Douglass and assignment of the black principals to like positions elsewhere within the system.

B-2. This proposal to encourage student participation in school extra-curricular activities by establishment of programs to develop integrated student leadership in these activities is approved.

B-3. The court approves the proposal that students currently attending a high school would not be affected by changes in student assignment; only those students coming in as 9th graders for the 1974-75 school year would be affected. Similarly, for the 1974-75 school year students currently attending a middle school would not be affected by the changes in student assignments; only those students incoming as 6th graders for the 1974-75 school year would be affected.

C-1. This program to provide information and to encourage compliance with the reassignment order is highly commendable and is approved by the court.

C-2. The court approves the proposal of the Board to assign all new white Millwood High School students transferring in to the Oklahoma City School District to Northeast High School unless they are enrolled in vocational courses not available at Northeast.

C-3. This proposal of the Board to define student rights and responsibilities and change discipline procedures to insure impersonal, and faster, consideration of charges of students misconduct that might lead to suspension is a proper exercise of the Board's responsibility and is approved. The Court calls to the Board's attention the Biracial Committee's suggestion that concentrated efforts be expended to insure the comprehensive distribution of the policy by the beginning of the 1974-75 school year.

C-4. The proposal of the Board concerning employment practices for clerical staff is approved.

Finally the court approves the particular proposed adjustments of attendance zones in specific grade structure assignments beginning with the 1974-75 school year as contained in said Third Report.

Accordingly, the proposals approved are hereby ordered implemented.

Dated this 3rd day of June, 1974.

s/ Luther Bohanon
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

FILED
JAN 28 1975
HOWARD K. PHILLIPS
Clerk, United States
Court of Appeals
Tenth Circuit

ROBERT L. DOWELL, etc. et al,	)	
	)	
Appellees,	)	
v.	)	
	)	No. 74-1415.
THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, etc. et al,	)	
	)	
	)	
Appellants.	)	

ORDER

This is a segment of the continuing efforts to remove all the vestiges of segregation from the Oklahoma City Schools. It is again but a part of the entire diverse effort, and must be so considered. If viewed as an isolated event, different considerations would have to be applied; however, in the context in which it reaches us, we have no hesitancy in affirming the order of the trial court.

The change of principals at the two high schools (Northeast and Douglass) was based on the following finding of the trial court:

> ". . . These are the two high schools in the system which have been and are now clearly racially identifiable in the community. So long as the two high schools with the largest black enrollment are the only high schools in the system with blacks as the top administrators it will be difficult, if not impossible, to erase

the racial characteristics of the schools' identity in the community. . . ."

This is sufficient to support the order.

The Board submitted a response to the suggestions of the Biracial Committee, and the suggestions of both on this and other unrelated subjects were considered. The trial court considered the matter and entered an order. This was apparently the usual practice, and no one asked for a hearing, nor was a hearing requested after the order was entered to reconsider the matter. The Board did nothing but ask this court to stay the order and filed an appeal. It was incumbent on the Board, in view of past practice, to ask for a hearing or some relief from the trial court if such was desired. In failing to do so, it cannot now complain. *See* Davis v. School District of Pontiac, 487 F.2d 890 (6th Cir.). Many orders have been so entered by the trial court in this action over the years.

The order of the trial court, herein appealed from, filed and dated June 3, 1974, is AFFIRMED.

Judge Breitenstein dissents.

A true copy

Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Mary A. Sherman
Deputy Clerk

No. 74-1415—DOWELL v. BOARD OF EDUCATION

Breitenstein, Circuit Judge, Dissenting.

The order in issue transfers two specific black principals to other schools. The transfer was recommended by the Biracial Committee which we have said acts only in an advisory capacity. Dowell v. Board of Education, 10 Cir.,

465 F.2d 1012, 1015. The record does not contain the report of the Committee. The court-ordered response of the Board of Education shows that four schools are involved, Douglass and Northeast which had black principals and Grant and Marshall which had white principals. Nothing in the record shows the reasons which motivated the Committee. The Board considered the matter and countered with a proposal that at least half of the assistant principals at each of the four schools be of the opposite race from that of the principal. The response of the Board says:

> "The Board concluded that keeping the current principals in these four schools is crucial to the maintenance of stability in these schools, particularly in the face of student unrest caused by further student assignment, and that the objectives of the suggestion could be accomplished by changing the races of the assistant principals at the schools."

Five days after the Board's response, the court without notice or hearing entered the order in dispute. In so doing the court said that the two schools then headed by black principals, Douglass and Northeast, "have been and are now clearly racially identifiable in the community." The only showing of racial composition of student bodies of the four schools is found in an exhibit attached to the response of the Board. It shows:

Projected Membership, March 18, 1974

School	% Black
Douglass	49.8
Northeast	48.0
Marshall	20.2
Grant	8.9

[APPENDIX]

Adjusted Membership with Proposed Changes

School	% Black
Douglass	46.6
Northeast	42.0
Marshall	21.2
Grant	10.4

The report of the Committee is not evidence. The response of the Board raised the fact question of stability which should only be resolved on the reception and consideration of evidence. The due process issues raised by the Board cannot be brushed off on the ground of past practices. The practices and procedures of a federal court do not transcend constitutional rights. A waiver of a constitutional right must be express. See D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 184-187. Implementation of an equitable remedy for school desegregation does not justify disregard of constitutionally mandated due process. At the very least this case should be remanded so that the appellate court will have some basis, other than past history, on which to base a decision. Concern should be for the present. Recalcitrance of a past Board does not carry over to a Board with new members.

Turning to the merits, the question is whether in the exercise of its equity powers a federal court can order the transfer of two specific principals because of their race. No authority is cited in support of this proposition and I am aware of none. True, a court in the exercise of its equity powers can order assignment of teachers to achieve a degree of faculty desegregation. Swann v. Board of Education, 402 U.S. 1, 19. However, we are concerned with the assignment of administrators, not teachers. The court did not justify its order on the ground of need for teacher desegregation. Without supporting evidence, it treats the presence of black principals as symbols of racial discrimination. No question is raised as to the competence of the two individuals.

Within constitutional limitations, management of schools is a local matter to be handled by the chosen representatives of the people. Swann v. Board of Education, 402 U.S. at 16, and Milliken v. Bradley, 94 S.Ct. 3112, 3125 and 3127. New Rider v. Board of Education, 10 Cir., 480 F.2d 693, 700, cert. denied 414 U.S. 1097, says that: "The judiciary is not designed to operate and manage school systems." The Board has the responsibility of operating a unitary school system and when it does not do so it may be brought to task by the court. At the same time the Board, in the performance of its duties, has the power to hire, fire, discipline, and assign its executive officers. It, not the court, operates the schools. I find nothing in the record which justifies the conclusion that the transfer of two black principals from schools, in which more than half of the student population is white, is necessary to, or even desirable in, the operation of the desegregation plan which the district court has adopted, this court approved, and the Board accepted.

By rejecting the Board's proposal and ordering the transfer of two executives the court entered the field of management, a function of the Board, and substituted its judgment for that of the Board. In so doing it abused its discretion and usurped power delegated to the Board.

I would reverse.

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of April, 1975, I mailed three copies, postage fully paid, to John W. Walker, 622 Pyramid Life Building, Little Rock, Arkansas 72201.

.....

J. HARRY JOHNSON
Counsel for Petitioners

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SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1250

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, etc., et al.,
Petitioners,

versus

ROBERT L. DOWELL, an Infant Who Sues by A. L. DOWELL, His Father and Next Friend,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF

In Opposition to Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1250

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, etc., et al.,
Petitioners,

versus

ROBERT L. DOWELL, an Infant Who Sues by A. L. DOWELL, His Father and Next Friend,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF

In Opposition to Certiorari

OPINIONS BELOW

The orders of the District and the Tenth Circuit are not reported but are set forth in Appendices A and B of the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether the United States District Court for the Western District of Oklahoma acted within the bounds of its discretion in changing the assignments of principals at two schools in the system which had remained clearly racially identifiable in part because of the system's historical assignment pattern.

STATUTE INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment as set forth at page 3 of the Petition.

STATEMENT OF THE CASE

This phase of this lengthy litigation involves the District Court's effort to further disestablish the racial identifiability of two former "black" senior high schools and to thereby insure compliance with the Court's prior orders.

The District Court has issued repeated orders requiring, in effect, the establishment of a unitary, nonracial school system.[1] The record is replete with substantive and substantiated findings that the school district has not proceeded in good faith to desegregate the schools. Most of those findings were made and upheld prior to the approval of the present comprehensive desegregation plan and prior to the effective functioning of the bi-racial committee.

Since their appointment, the members of the bi-racial committee have made many recommendations for the maintenance and furtherance of desegregation. Upon receipt of suggestions and recommendations from the bi-racial committee, the Court followed the practice of inviting and receiving responses thereto from the parties and thereafter entering ORDERS either approving, disapproving or modifying the suggestions and recommendations. The full record clearly establishes this procedure.

In the instant case, the bi-racial committee recommended in its April 30, 1974 report, *inter alia*, that the races of the principals at four specific senior high schools be changed. The Committee also recommended certain boundary changes for desegregation purposes. The Court entered an ORDER on May 2, 1974, stating that it had approved school board proposals for

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[1] The respective relevant ORDERS were entered on the following dates: (1) July 11, 1963; (2) September 7, 1965; (3) August 16, 1967; (4) August 8, 1969; (5) August 13, 1969; (6) September 11, 1969; (7) January 17, 1970; (8) February 1, 1972; and (9) February 4, 1972.

"minimal changes" in attendance zones of Northeast, Douglas and Grant high schools in order to further "eliminate all vestiges of state imposed segregation." The Court went on to find that despite its prodding, the school system retained numerous vestiges of segregation, for which the board was not undertaking voluntarily to devise and implement appropriate and effective remedies. The Court said:

> "There is no evidence that the individual board members are even reading the Board's own reports to the Court or those of the Bi-racial Committee. Useful and constructive recommendations by the bi-racial committee have repeatedly been totally ignored by the board without even token discussion . . ."
>
> ". . . the Board apparently is repeating the same old pattern of recalcitrance condemned by the Court in its Order of February 1, 1973."

The Court then specifically directed the school board to, on or before May 10, 1974

> *"report in writing to the Court what steps have been taken to comply with the Court's order of August 16, 1973, and shall specifically respond to the suggestions made by the Bi-racial Committee in its report of May 1, 1974."* [Emphasis added]

The Court went further and required the school board to advise on a regular (daily if necessary) basis with the chairman of the bi-racial committee so that the latter body would be able to give "immediate" and intelligent consideration to the recommendations.

On May 29, 1974, the school board responded, stating:

> "[After] . . . careful and deep consideration . . . to the suggestion that the races of the principals be changed at Douglas, Northeast, Marshall and Grant . . . the Board

> concluded that keeping the current principals in these four schools is crucial to the maintenance of stability in these schools, particularly in the fact of student unrest caused by further student assignment, and that the objectives of the suggestion could be accomplished by changing the races of the assistant principals at the schools." [See THIRD REPORT UNDER ORDER DATED MAY 1, 1974]

At no time did the school board request or otherwise indicate to the Court that it wished to be heard either *before* or *after* the Court passed upon the recommendations of the bi-racial committee.

On May 30, 1974, the bi-racial committee reported, *inter alia*, that it felt:

> "the desegregation plan would be advanced significantly if, as a minimum, the principals at Northeast and Douglas were white. The present black principals should be equally able to serve any other high schools in the district."

On June 3, 1974, the Court entered an ORDER which approved the school board's plan to change the assignments of vice principals. The Court's further ORDER related to the race of the two principals at Northeast and Douglas. Said the Court:

> "These are the two high schools in the system which have been and are now clearly racially identifiable in the community. *So long as the two high schools with the largest black enrollment are the only high schools in the system with blacks as the top administration it will be difficult, if not impossible, to erase the racial characteristics of the schools' identity in the community.*" [Emphasis added]

The Court found further that the identifiability factor was buttressed by the pattern of assignments of principals, i.e., white principals in the white communities (kindergarten through

fourth and fifth grade centers): black principals in black communities (fifth grade centers). The Court was aware that in:

> ". . . the normal situation the assignment of school principals is the matter of administration and of no concern to the Court but in the factual context here presented, the Board manifests a policy calculated to maintain the present status of these schools [black] and to discriminate against black administrators." [Bracketing added for clarification]

The school board filed Notice of Appeal on June 12, 1974. The school board also filed a Motion in the District Court to Stay Order pending Appeal. The Motion, which was opposed by respondent, was denied by the District Court on June 21, 1974.

The school board filed a Stay Motion in the United States Court of Appeals for the Tenth Circuit on July 1, 1974, which that Court rejected on July 22, 1974, one judge dissenting.

The school board filed a Motion for Summary Reversal in the United States Court of Appeals for the Tenth Circuit on or about July 25, 1974, which the Court of Appeals rejected on August 9, 1974, one judge dissenting.

On January 28, 1975, the District Court's order of June 3, 1974, was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting.

ARGUMENTS

District Court's Discretion

The District Court acted within the bounds of its discretion in ordering a change in the assignment of the two principals at the two high schools with the largest black enrollment in the system. These two high schools were also the only high schools in the system with blacks as the top administrators. In its effort to disestablish the racially identifiable characteristics of the schools involved, the District Court considered the historical development of the school district during this lengthy litigation and the pattern of assignments of principals in the system. If the action of the District Court is considered in the context of this historical development, it fits clearly within the guidelines of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 19 (1971).

The basis for the District Court's order was in fact the race of the principal at each high school involved. But such a consideration is necessary. See, *Swann v. Charlotte-Mecklenburg Board of Education, supra; Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F. 2d 158, 168 (1967) (Concurring Opinion).

The only argument in opposition to the recommendation of the bi-racial committee submitted by the petitioners to the District Court was that it would affect the stability of the student population. This argument was appropriately rejected. See, *Mays v. Board of Public Instruction of Sarasota County, Florida*, 428 F. 2d 809. 810 (5th Cir. 1970).

DUE PROCESS

Although the respondent contends that a hearing was not necessary before the District Court issued its order, the School Board has not been denied the opportunity for such a hearing.

During the course of this litigation, the bi-racial committee has made many recommendations in its effort to further the goal of the complete desegregation of the Oklahoma City School System. The District Court, in every instance, has invited the responses of the parties to this suit. After considering the proposals and the responses, the Court has entered orders directed to those recommendations. The defendant school board is well aware of this practice. The school board did not, however, request a hearing initially, and has not subsequently requested of the District Court that it hold an evidentiary hearing to consider the proposal of the bi-racial committee.

The District Court acted within its discretion, given the past practices accepted by all parties, in assuming that if the school board wanted a hearing it would advise the Court of its position. Instead, the school board submitted its response as usual. After the District Court issued its order, the school board did not reveal its hidden desire for an evidentiary hearing and request that the District Court reconsider its decision. It, instead, filed a motion in that Court to stay its order pending appeal, and filed notice of appeal on the same date. Again, no mention was made in this motion of a hearing.

The position taken by the school board is untenable, given the prolonged history of segregation in the Oklahoma City School System. As a result of this continuous segregation, the school board has the burden of justifying its administrative and faculty assignments. See, *Lee v. Macon County Board of Education*, 453 F. 2d 1104 (5th Cir. 1971). The District Court's task in

determining the sufficiency of a school system's compliance with desegregation orders is a continuing one. The District Court's June 3, 1974, order is but another necessary step, after more than 13 years of litigation, in assuring constitutional compliance.

Because the District Court's order is based in part on historical considerations peculiar to this school district, a grant of certiorari would require a re-examination of the evidence presented during that period.

The District Court's order is consistent with the decision in *Davis v. School District of City of Pontiac, Inc.*, 487 F. 2d 890 (6th Cir. 1973).

CONCLUSION

For the above reasons, a writ of certiorari should be denied.

Respectfully submitted

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Certificate of Service

This is to certify that on the 12th day of June, 1975, I mailed three copies, postage fully paid, to J. Harry Johnson, 603 First National Center, Oklahoma City, Oklahoma, 73102, and three copies to Larry L. French, P. O. Box 1285, Seminole, Oklahoma, 74868.

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